FEB 22 2001

(5)

Supreme Court, U.S.
FILED
FEB 22 2001
CLERK

No. 00-763

In the Supreme Court of the United States

SHARON B. POLLARD, PETITIONER

v.

E.I. DUPONT DE NEMOURS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

WILLIAM R. YEOMANS
Acting Assistant Attorney General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

DENNIS J. DIMSEY
JENNIFER LEVIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GWENDOLYN YOUNG REAMS
Associate General Counsel

PHILLIP B. SKLOVER
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

CAREN I. FRIEDMAN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20463

QUESTION PRESENTED

Whether an award of front pay in an action brought under Section 706 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, is subject to the cap on compensatory and punitive damages established by the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(3).

TABLE OF CONTENTS

	Page
Interest of the United States and the Equal Employment Opportunity Commission	1
Statutory provisions involved	2
Statement	2
Summary of argument	8
Argument:	
Front pay awards in Title VII cases are not subject to the cap on compensatory and punitive damages established by 42 U.S.C. 1981a	10
A. Equitable remedies that are available under 42 U.S.C. 2000e-5(g) are not subject to the cap on damages	10
B. Front pay is authorized under Section 2000e-5(g)	13
C. The legislative history of the 1991 Act and EEOC guidance further support the conclusion that front pay awards are not subject to the damages cap	20
Conclusion	24
Appendix A	1a
Appendix B	29a

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	11, 16
Anderson v. *Group Hospitalization, Inc.*, 820 F.2d 465 (D.C. Cir. 1987)	13
Barbano v. *Madison County*, 922 F.2d 139 (2d Cir. 1990)	14

Cases—Continued: Page

Barbour v. *Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), cert. granted in part, 516 U.S. 1086 (1996), and dismissed, 516 U.S. 1155 (1996) 15
Blum v. *Witco Chem. Corp.*, 829 F.2d 367 (3d Cir. 1987) 14
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 16
Cassino v. *Reichhold Chems., Inc.*, 817 F.2d 1338 (9th Cir. 1987), cert. denied, 484 U.S. 1047 (1988) 13, 15
EEOC v. *W&O, Inc.*, 213 F.3d 600 (11th Cir. 2000) 17
Faragher v. *City of Boca Raton*, 524 U.S. 775 (1998) 16
Fitzgerald v. *Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980) 13, 14
Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976) 15, 16
General Elec. Co. v. *Gilbert*, 429 U.S. 125 (1976) 23
Gotthardt v. *National R.R. Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999) 13, 17
Hadley v. *VAM P T S*, 44 F.3d 372 (5th Cir. 1995) 17
Hudson v. *Reno*, 130 F.3d 1193 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1988) 6, 9, 17, 18, 19
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 11
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1944) 11-12, 16, 17, 20, 22
Lorillard v. *Pons*, 434 U.S. 575 (1978) 16
Lussier v. *Runyon*, 50 F.3d 1103 (1st Cir.), cert. denied, 516 U.S. 815 (1995) 17
Kolstad v. *American Dental Ass'n*, 527 U.S. 526 (1999) 12
Kramer v. *Logan County Sch. Dist. No. R-1*, 157 F.3d 620 (8th Cir. 1998) 8, 17

Cases—Continued: Page

Martini v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000) 8, 17
McCue v. *Kansas Dep't of Human Res.*, 165 F.3d 784 (10th Cir. 1999) 17
McKennon v. *Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) 15
McKnight v. *General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), cert. denied, 499 U.S. 919 (1991) 14
Medlock v. *Ortho Biotech, Inc.*, 164 F.3d 545 (10th Cir.), cert. denied, 528 U.S. 813 (1999) 8, 17
Meritor Sav. Bank, FSB v. *Vinson*, 477 U.S. 57 (1986) 16, 23
Morgan v. *Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990) 14
Newhouse v. *McCormick & Co.*, 110 F.3d 635 (8th Cir. 1997) 18
Nord v. *United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985) 14
Pals v. *Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000) 17, 19
Patterson v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976) 13, 14
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 11
Powers v. *Grinnell Corp.*, 915 F.2d 34 (1st Cir. 1990) 15
Shore v. *Federal Express Corp.*, 777 F.2d 1155 (6th Cir. 1985) 14
Suggs v. *ServiceMaster Educ. Food Mgmt.*, 72 F.3d 1228 (6th Cir. 1996) 18
Teamsters v. *Terry*, 494 U.S. 558 (1990) 14
Thompson v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982) 14
Thorne v. *City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986) 14

Cases—Continued: Page

Thurman v. *Yellow Freight Sys., Inc.*, 97 F.3d 833 (6th Cir. 1996) 18
United States v. *Burke*, 504 U.S. 229 (1992) 11, 15, 19
Walsdorf v. *Board of Comm'rs*, 857 F.2d 1047 (5th Cir. 1988) 14
Whittlesey v. *Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984) 15
Wildman v. *Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985) 14
Williams v. *Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998) 6, 14, 17, 19
West v. *Gibson*, 527 U.S. 212 (1999) 21

Statutes:

Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*) 1
42 U.S.C. 2000e-5(a) 2
42 U.S.C. 2000e-5(g) (§ 706(g), 78 Stat. 261) ..... *passim*
42 U.S.C. 2000e-5(g) (1988) 11
42 U.S.C. 2000e-5(g)(1) 13
42 U.S.C. 2000e-5(f) 2
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071:
42 U.S.C. 1981 ..... 11, 21
42 U.S.C. 1981 note (§ 2, 105 Stat. 1071) 21
42 U.S.C. 1981a (§ 102, 105 Stat. 1072-1074) ..... *passim*
42 U.S.C. 1981a(a)(1) 1-2, 8, 11, 16, 30a
42 U.S.C. 1981a(a)(2) 31a
42 U.S.C. 1981a(a)(3) 32a
42 U.S.C. 1981a(b)(1)-(3) 2, 32a-33a
42 U.S.C. 1981a(b)(1) 7, 11, 32a
42 U.S.C. 1981a(b)(2) 9, 12, 13, 16, 18, 19, 23, 33a
42 U.S.C. 1981a(b)(3) 6, 7, 12, 18, 19, 20, 33a
42 U.S.C. 1981a(b)(4) 34a
42 U.S.C. 1981a(c) 34a

Statutes—Continued:	Page
42 U.S.C. 1981a(d)(1)	2, 34a
42 U.S.C. 1981a(d)(2)	35a
Miscellaneous:	
137 Cong. Rec. (1991):	
p. 13,515	21
p. 13,516	21
pp. 13,552-13,553	21
p. 28,637	22
pp. 28,663-28,664	22
p. 29,046	22
pp. 29,066-29,067	22
p. 30,661	22
EEOC, Compl. Man (CCH) § 603, ¶ 2062 (1998)	19
EEOC, *Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991* <www.eeoc.gov/docs/damages.html> (effective July 14, 1992) (8 Fair Empl. Prac. Man. (BNA) 405:7091 (1992))	12, 23
H.R. Rep. No. 40, 102d Cong., 1st Sess. (1991):	
Pt. 1	21, 22
Pt. 2	21, 22
Mack A. Player, *Employment Discrimination Law* (1988)	14
1 *Timothy* 2:11-12	5

In the Supreme Court of the United States

No. 00-763

SHARON B. POLLARD, PETITIONER

v.

E.I. DUPONT DE NEMOURS COMPANY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*), prohibits employment discrimination by both public and private employers on the basis of race, color, religion, sex, or national origin, and authorizes equitable remedies against both public and private employers. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072-1074 (42 U.S.C. 1981a), authorized, in cases of intentional discrimination, the additional remedies of compensatory damages and (in suits against private employers) punitive damages, subject to a cap on the total amount of damages awarded. See 42 U.S.C.

1981a(a)(1) and (b)(1)-(3). The Equal Employment Opportunity Commission (EEOC) is authorized to enforce Title VII against private employers, and participated as amicus curiae in the court of appeals. The Attorney General is authorized to enforce Title VII against public employers. See 42 U.S.C. 1981a(d)(1), 2000e-5(a) and (f). This case presents the question whether front pay—which makes the plaintiff whole for earnings that would have been received had she been reinstated immediately after a finding of liability—is an equitable remedy when awarded under Title VII, or instead a damages remedy subject to the statutory cap. The Court's determination of the proper categorization of front pay is likely to affect both the EEOC and the Attorney General in their enforcement of Title VII.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title VII and the Civil Rights Act of 1991—42 U.S.C. 2000e-5(g) and 42 U.S.C. 1981a, respectively—are set forth in an appendix to this brief. App., *infra*, 29a-35a.

STATEMENT

1. Petitioner worked for respondent from 1977 until respondent terminated her in 1996. Pet. App. 3a; App., *infra*, 2a, 19a.[1] In 1987, petitioner was promoted to the position of "operator" in the peroxide department of respondent's chemical plant in Memphis, Tennessee. Pet. App. 3a; App., *infra*, 2a. The district court found that "[i]t was common knowledge among the employees in the peroxide area that * * * many of the * * *

---

[1] The petition appendix contains only a portion of the district court's opinion. The opinion is reproduced in full in Appendix A, *infra*.

men in the area, did not approve of women working in peroxide." App., *infra*, 5a; see Pet. App. 5a.[2]

In February 1994, petitioner agreed to give a talk to a group of girls visiting the Memphis plant as part of respondent's participation in the national Take Your Daughters to Work Day program. Pet. App. 4a. Another operator named Steve Carney strongly objected to Take Your Daughters to Work Day and instructed all of the men on petitioner's shift not to eat with petitioner, not to share food with her, not to be in the break room with her, not to talk to her, and not to accept directions from petitioner without first consulting him. *Ibid.*; App., *infra*, 4a-5a.

In the summer of 1994, Carney, who was in charge of the peroxide department's control room, began setting off false alarms in petitioner's area of the plant. The false alarms required petitioner to search a work area the size of three city blocks for non-existent problems. Pet. App. 6a; App., *infra*, 8a-9a & n.7. This was Carney's "way of showing that he, a man, was in control." Pet. App. 6a. If a false alarm sounded while petitioner was on break cooking her dinner, male employees would sometimes turn up the stove to burn her food while she searched for a problem. *Ibid.*; App., *infra*, 8a. Carney also failed to inform petitioner of actual alarms, thus creating an appearance that petitioner was not performing her duties. Pet. App. 6a.

On approximately seven occasions in 1994 and 1995, Carney ordered assistant operators to remove vaporizers from peroxide tanks earlier than petitioner had instructed, without telling petitioner. Pet. App. 6a-7a.

---

[2] Several male employees in the peroxide department routinely referred to petitioner and other women as "bitches," "cunts," "heifers," and "split tails." Pet. App. 5a; App., *infra*, 5a-6a.

Early removal of the vaporizers could result in a shortfall of peroxide production. App., *infra*, 9a-10a & n.8. When petitioner learned that Carney was ordering removal of vaporizers, she spoke with the shift supervisor, David Swartz, about the problem. Carney blamed petitioner, and Swartz took no action. Pet. App. 7a; App., *infra*, 10a-11a.

During the summer of 1994, someone slashed the tires on petitioner's bicycle while it was parked in the peroxide area. Petitioner told Swartz that she suspected Carney. Carney denied slashing the tires, and Swartz did not investigate further. Pet. App. 7a.

In December 1994, two male employees asked Swartz to call a meeting to discuss the men's treatment of petitioner. Pet. App. 7a. Carney was absent from work on the day of the meeting, and two male employees stated in Swartz's presence that Carney had encouraged the men not to speak with petitioner. *Id.* at 7a-8a; App., *infra*, 12a. When Carney returned to work, he demanded another meeting. At that meeting, and again in Swartz's presence, Carney "got in [petitioner's] face" and told her "Nobody in this area likes you, you're here all alone, it's all your own fault." Pet. App. 8a. When petitioner appealed to Swartz, Swartz ended the meeting. *Ibid.*

The problems continued, and petitioner complained to Swartz and to attendees at company "Women's Network" meetings. Swartz's supervisor, Beth Basham, attended the Women's Network meetings. Pet. App. 8a. Basham acknowledged at trial that she was aware of the problems and that she believed petitioner was harassed on account of her sex. Yet Basham never investigated petitioner's complaints. *Id.* at 8a-9a; App., *infra*, 14a-15a, 26a.

In July 1995, petitioner asked to be transferred to another shift. Petitioner was offered a job working with a man who had in the past refused to take orders from petitioner because she is a woman, and who had placed on petitioner's desk the biblical passage: "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Pet. App. 10a; *id.* at 3a-4a; see also 1 *Timothy* 2:11-12. Petitioner declined that reassignment and, after discovering a highlighted copy of the same Bible verse in her locker, she requested a medical leave of absence. Pet. App. 10a.

After petitioner's departure, the employees on her old shift, including Swartz, held a party with balloons and a fish fry to celebrate. Pet. App. 11a. Respondent investigated the second Bible verse incident by asking the men in the peroxide area (singly or in groups) a set of "yes" or "no" questions. When no one admitted knowledge of the incident, respondent ended the investigation. *Id.* at 10a-11a; App., *infra*, 17a.

After petitioner had been on short-term disability leave for six months, respondent, rejecting the opinion of a company psychologist who determined that petitioner could not return to work, scheduled a "return to work" meeting. Pet. App. 11a; App., *infra*, 18a-19a. Company managers refused to guarantee that petitioner would not be placed on a shift with Carney, and petitioner refused to return to work under those circumstances. Respondent then fired petitioner. Pet. App. 11a.

2. After a bench trial, the district court found that respondent subjected petitioner to a hostile work environment because of her gender, in violation of Title VII. App., *infra*, 19a-25a. The district court described the case as one "of wretched indifference to an em-

ployee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched." *Id.* at 27a.

The district court awarded petitioner $107,364 in back pay and accrued benefits, $300,000 in compensatory damages, and $252,997 in attorney's fees. App., *infra*, 27a-28a; Pet. App. 2a. The award of $300,000 in compensatory damages was the maximum amount allowable under 42 U.S.C. 1981a(b)(3), which establishes a statutory cap for compensatory and punitive damages awards that ranges from $50,000 for employers with between 14 and 101 employees, to $300,000 for employers (such as respondent) with more than 500 employees. The district court included an amount for front pay within the compensatory damages award. See App., *infra*, 27a-28a n.19.[3] The court explained that it treated the front pay award as compensatory damages because it was required to do so by *Hudson* v. *Reno*, 130 F.3d 1193, 1204 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998). The court stated, however, that when front pay was included, the capped damages award of $300,000 was "insufficient to compensate plaintiff for the psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement." App., *infra*, 27a-28a n.19. The district court also noted that the cap prevented it from making an additional award of punitive damages, even though punitive damages were justified "as [respondent] has 'engaged in a discriminatory practice with malice or with reckless indifference

---

[3] See generally *Williams* v. *Pharmacia, Inc.*, 137 F.3d 944, 953-954 (7th Cir. 1998) ("Front pay gives the employee the earnings she would have received had she been reinstated to her old job [after a finding of liability].").

to the federally protected rights of [petitioner].'" *Id.* at 28a n.19 (quoting 42 U.S.C. 1981a(b)(1)).

3. The court of appeals affirmed. The court rejected respondent's claim that the abuses petitioner suffered did not amount to sex-based harassment, finding "overwhelming" record evidence that petitioner suffered "severe and pervasive" harassment based on anti-female animus. Pet. App. 12a-14a. The record also supported the district court's conclusion that respondent "did not [make] a 'good faith' effort to remedy the situation." *Id.* at 15a-16a. The court of appeals rejected respondent's argument that the abuses suffered by petitioner were retaliation for her complaints to management, rather than sexual harassment. *Id.* at 16a. And, the court of appeals concluded that petitioner was not required to prove economic disparate treatment in order to recover under Title VII, given that she had established a hostile work environment based upon gender. *Id.* at 16a-17a.

The court of appeals found no merit in respondent's allegation of judicial bias. Pet. App. 18a-20a. The "anger and moral outrage" displayed by the district court late in the trial "stemmed from the conclusions which the judge had rightly formed as part of his factfinding duty" during the presentation of evidence. *Id.* at 19a-20a. Finally, the court of appeals affirmed the award of attorney's fees to petitioner. *Id.* at 20a.

The court of appeals rejected petitioner's cross-appeal challenging the district court's application of Section 1981a(b)(3)'s cap on compensatory and punitive damages to front pay, which reduced the amount of compensatory damages awarded and precluded punitive damages. Pet. App. 21a-22a. The court of appeals stated that it agreed with petitioner, with the EEOC as amicus curiae, and with all other courts of appeals to

consider the issue, that front pay is not subject to the cap. *Ibid.* (citing, *inter alia*, *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-1349 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000); *Medlock* v. *Ortho Biotech, Inc.*, 164 F.3d 545, 556 (10th Cir.), cert. denied, 528 U.S. 813 (1999); *Kramer* v. *Logan County Sch. Dist. No. R-1*, 157 F.3d 620, 625-626 (8th Cir. 1998)). The court of appeals determined, however, that its "hands are tied" by the earlier panel opinion in *Hudson* v. *Reno*. Pet. App. 22a. In light of *Hudson*, the court of appeals affirmed the district court's ruling that front pay must be included in the capped $300,000 damages amount. *Ibid.*[4]

The court of appeals denied cross-petitions for rehearing or rehearing en banc. Pet. App. 49a-50a.

SUMMARY OF ARGUMENT

1. Before 1991, Title VII authorized only equitable relief pursuant to 42 U.S.C. 2000e-5(g). The Civil Rights Act of 1991 (1991 Act), however, made compensatory and punitive damages available under specified circumstances, "in addition to any relief" previously authorized by Section 2000e-5(g). 42 U.S.C. 1981a(a)(1). Congress capped the amount of compensatory and punitive damages that could be awarded under the 1991 Act, but defined "compensatory damages" to exclude "any * * * type of relief authorized under section

---

[4] The court of appeals also rejected petitioner's arguments, not presented in the petition for certiorari, that Section 1981a's cap on compensatory and punitive damages violates the constitutional doctrine of separation of powers and denies certain plaintiffs equal protection. See Pet. App. 22a-24a. The court of appeals reversed the district court, however, with respect to its grant of summary judgment for respondent on petitioner's claim of intentional infliction of emotional distress. *Id.* at 24a-26a.

[2000e-5(g)]." 42 U.S.C. 1981a(b)(2). Accordingly, the 1991 Act's cap on damages does not limit a court's ability to award equitable relief under Section 2000e-5(g).

2. Congress drafted the 1991 Act against the background of consistent judicial rulings that front pay is a permissible equitable remedy under Section 2000e-5(g). When Congress stated in 42 U.S.C. 1981a(b)(2) that compensatory damages "shall not include * * * any * * * type of relief authorized under section [2000e-5(g)]," it incorporated the established understanding that front pay was one such authorized type of relief. The 1991 Act, moreover, did not amend the language of Section 2000e-5(g) that authorizes front pay. All courts of appeals to consider the issue, other than the Sixth Circuit, have held that front pay remains available as an equitable remedy after the 1991 amendments.

The Sixth Circuit's conclusion in *Hudson* v. *Reno*, 130 F.3d 1193 (1997), cert. denied, 525 U.S. 822 (1998), that front pay is a form of compensatory damages subject to the 1991 Act's cap on damages, was incorrect. In reaching that conclusion, the Sixth Circuit failed to give effect to Congress's explicit statement, in Section 1981a(b)(2), that the capped compensatory damages awarded under Section 1981a do not include equitable remedies authorized by Section 2000e 5(g). All other courts of appeals to consider *Hudson*'s reasoning have rejected it, and even the Sixth Circuit panel in this case concurred that *Hudson* reflects a mistaken application of the 1991 Act. See Pet. App. 22a.

3. The committee reports and legislative debates on the 1991 Act confirm that Congress intended to *supplement* the equitable remedies historically available under Title VII, not to limit them. During the debates,

legislators specifically noted that front pay was an existing Title VII remedy that would not be treated as a species of "compensatory damages" under the new law. Construing the 1991 amendments as placing a new restriction on the pre-existing front pay remedy would frustrate Congress's objectives of making victims of employment discrimination more nearly whole, enhancing the deterrent effect of Title VII, and encouraging private enforcement. Indeed, that reading of the 1991 law would make some victims of intentional employment discrimination worse off than they would have been if Congress had not authorized supplemental damages remedies.

Consistent with the text and legislative history of the 1991 Act, the EEOC determined in 1992 that Section 1981a's cap on damages does not apply to front pay awards. The EEOC has consistently adhered to that construction of the 1991 Act, and its interpretation provides additional guidance for the Court.

ARGUMENT

FRONT PAY AWARDS IN TITLE VII CASES ARE NOT SUBJECT TO THE CAP ON COMPENSATORY AND PUNITIVE DAMAGES ESTABLISHED BY 42 U.S.C. 1981a

A. Equitable Remedies That Are Available Under 42 U.S.C. 2000e-5(g) Are Not Subject To The Cap On Damages

Before 1991, the statutory remedies for employment discrimination based on race, color, religion, sex, or national origin in violation of Title VII did not include compensatory or punitive damages. Section 706(g) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261, which is codified as amended as 42 U.S.C. 2000e-5(g), limited available remedies to back pay,

injunctions, and other equitable relief. See *United States* v. *Burke*, 504 U.S. 229, 238 (1992).[5] Title VII "focuse[d] on 'legal injuries of an economic character,'" and the corresponding remedies consisted of restoring victims of discrimination "to the wage and employment positions they would have occupied absent the unlawful discrimination." *Id.* at 239 (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975)).

The 1991 Act made "a marked change" in the scope of the injury redressable through Title VII. *Burke*, 504 U.S. at 241 n.12. The 1991 Act added a new provision, 42 U.S.C. 1981a, that allowed a successful Title VII plaintiff who is not eligible to recover under 42 U.S.C. 1981[6] to recover, "in addition to any relief" previously authorized by Section 2000e-5(g), (1) compensatory damages in cases of intentional discrimination (but not cases of disparate impact), and (2) punitive damages in cases of malice or reckless indifference to federally protected rights by a private employer. 42 U.S.C. 1981a(a)(1) and (b)(1); see generally *Landgraf* v. *USI*

---

[5] Section 2000e-5(g) provided before 1991, and provides today, that in the event of a successful claim,

> the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate.

App., *infra*, 29a; see 42 U.S.C. 2000e-5(g) (1988).

[6] Section 1981 authorizes compensatory and punitive damages for race discrimination that is actionable under that provision. See generally *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175-188 (1989) (discussing scope of Section 1981 in employment context); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975).

Film Prods., 511 U.S. 244, 252-255 (1994) (discussing 1991 Act's "major expansion in the relief available to victims of employment discrimination"); *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 533-534 (1999) (same).

In authorizing the new damages remedies, Congress placed a cap on the amount of compensatory and punitive damages a plaintiff could recover. 42 U.S.C. 1981a(b)(3). That cap limits "[t]he sum of the amount of compensatory damages awarded under [Section 1981a] for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under [Section 1981a]" to between $50,000 and $300,000, depending upon the size of the employer's workforce. 42 U.S.C. 1981a(b)(3).[7]

At the same time, Congress expressly provided that the availability of compensatory damages, subject to the cap, would not affect or overlap the availability of traditional equitable remedies under Section 2000e-5(g).[8] Section 1981a(b)(2), entitled "Exclusions from compensatory damages," states: "Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act

---

[7] Although damages recovery for future pecuniary losses is subject to the cap established by Section 1981a(b)(3), damages recovery for past pecuniary losses is not. See generally, EEOC, *Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991*, at 4-5 <http://www.eeoc.gov/docs/damages.html> (effective July 14, 1992) (*reprinted* in 8 Fair Empl. Prac. Man. (BNA) 405:7091 (1992)).

[8] There was no issue of overlap between punitive damages and the "make whole" equitable relief available under Section 2000e-5(g).

of 1964 (42 U.S.C. 2000e-5(g))." 42 U.S.C. 1981a(b)(2). Accordingly, the cap on certain damages awarded under Section 1981a does not affect a court's ability to award "any other type of relief" that is available as an equitable remedy under Section 2005e-5(g).

B. Front Pay Is Authorized Under Section 2000e-5(g)

Front pay is a type of equitable relief available to plaintiffs in Title VII cases under Section 2000e-5(g). Front pay therefore is exempt from the cap on compensatory and punitive damages awarded under Section 1981a, contrary to the holdings of the district court and the court of appeals in this case.

1. Front pay commonly is awarded in Title VII cases when the court determines that reinstatement—an equitable remedy specifically authorized by Section 2000e-5(g)(1)—is not viable for a reason such as extreme hostility between the plaintiff and the employer or its workers, or psychological injuries suffered by the plaintiff as a result of the discrimination.[9] Front pay is also awarded to cover wages foregone during the period between an order of reinstatement and actual reinstatement, which may be prolonged if, for example, no suitable position is vacant.[10] By 1991, every court of appeals to rule on the issue had approved front pay

---

[9] See, *e.g.*, *Gotthardt* v. *National R.R. Passenger Corp.*, 191 F.3d 1148, 1155-1156 (9th Cir. 1999) (medical and psychological condition); *Cassino* v. *Reichhold Chems., Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987) (hostility), cert. denied, 484 U.S. 1047 (1988); *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980) (same).

[10] See, *e.g.*, *Anderson* v. *Group Hospitalization, Inc.*, 820 F.2d 465, 473 (D.C. Cir. 1987); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 267-270 (4th Cir.), cert. denied, 429 U.S. 920 (1976).

awards under Section 2000e-5(g), or held more generally that front pay in lieu of reinstatement is an equitable remedy.[11] Those courts typically reasoned that front pay "is the monetary equivalent of the equitable remedy of reinstatement," and, when awarded as a substitute for reinstatement, is itself an equitable remedy. *Blum* v. *Witco Chem. Corp.*, 829 F.2d 367, 383 (3d Cir. 1987); see *Teamsters* v. *Terry*, 494 U.S. 558, 571 (1990) ("a monetary award incidental to or intertwined with injunctive relief may be equitable" in nature) (internal quotation marks omitted).[12]

---

[11] See, *e.g.*, *Thompson* v. *Sawyer*, 678 F.2d 257, 292 (D.C. Cir. 1982); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605, 615-616 (1st Cir. 1985) (applying Age Discrimination in Employment Act (ADEA), but relying on Title VII case law); *Barbano* v. *Madison County*, 922 F.2d 139, 146-147 (2d Cir. 1990); *Blum* v. *Witco Chem. Corp.*, 829 F.2d 367, 383 (3d Cir. 1987); *Patterson*, 535 F.2d at 269 (4th Cir.); *Walsdorf* v. *Board of Comm'rs*, 857 F.2d 1047, 1054 (5th Cir. 1988); *Shore* v. *Federal Express Corp.*, 777 F.2d 1155, 1159-1160 (6th Cir. 1985); *Morgan* v. *Arkansas Gazette*, 897 F.2d 945, 954 (8th Cir. 1990) (ADEA case); *Thorne* v. *City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Fitzgerald*, 624 F.2d at 957 (10th Cir.); *Nord* v. *United States Steel Corp.*, 758 F.2d 1462, 1473-1474 (11th Cir. 1985); see also *McKnight* v. *General Motors Corp.*, 908 F.2d 104, 116-117 (7th Cir. 1990) (reserving question of availability of front pay under Title VII), cert. denied, 499 U.S. 919 (1991). Commentators assumed as well that Title VII authorized front pay. See, *e.g.*, Mack A. Player, *Employment Discrimination Law* § 5.66, at 438 (1988) (stating that "the court should order" front pay covering the period "until the defendant offers substantially equivalent employment").

[12] In accordance with the plaintiff's duty to mitigate damages, courts calculate front pay by determining the present value of future earnings from the job to which the plaintiff ordinarily would have been reinstated, less the earnings the employee is receiving or would be expected to receive from a new job. See *Williams* v. *Pharmacia, Inc.*, 137 F.3d 944, 954 (7th Cir. 1998); see also

Decisions of this Court confirm that front pay was regarded as an available remedy under Section 2000e-5(g) before the 1991 amendments. The Court noted in at least two cases that, before passage of the 1991 Act, front pay might be awarded as an equitable remedy under Section 2000e-5(g). *Burke*, 504 at 239 n.9 ("Some courts have allowed Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible to recover 'front pay' or future lost earnings."); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 777 n.38 (1976) (recognizing "the possibility of an award of monetary damages (sometimes designated 'front pay')"); see *id.* at 781 (Burger, C.J., concurring in part and dissenting in part) ("An award such as 'front pay' could replace the need for competitive-type seniority relief."); see also *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 360-362 (1995) (suggesting that front pay would sometimes be appropriate equitable relief under the ADEA, albeit not when the employee has engaged in wrongdoing). More broadly, the Court had held that Section 2000e-5(g) granted the courts "full equitable powers" to make whole those persons who suffer injuries on account of prohibited employment discrimination.

Barbour v. *Merrill*, 48 F.3d 1270, 1279-1280 (D.C. Cir. 1995) (discussing factors relevant to establishing amount of front pay award), cert. granted in part, 516 U.S. 1086, and dismissed, 516 U.S. 1155 (1996); *Cassino*, 817 F.2d at 1347 (reversing front pay award covering full period from trial to expected retirement). As a practical matter, therefore, front pay is awarded in lieu of reinstatement "where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment." *Powers* v. *Grinnell Corp.*, 915 F.2d 34, 42-43 (1st Cir. 1990) (quoting *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984)).

Albemarle Paper Co., 422 U.S. at 418. Congress's grant of "broad equitable discretion" thus empowered district courts "to fashion such relief as the particular circumstances of a case may require to effect restitution," including relief related to future earnings. *Franks*, 424 U.S. at 763-766 & n.21.

When Congress stated in Section 1981a(b)(2) that compensatory damages "shall not include" any type of equitable relief authorized under Section 2000e-5(g), it legislated against that uniform understanding that front pay was an available equitable remedy. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); see *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979). The presumption that Congress knows the law is particularly apt in the case of the 1991 Act, because the Act was in large part a response to judicial decisions. See *Landgraf*, 511 U.S. at 250-251 (discussing decisions and congressional response); *Cannon*, 441 U.S. at 697-698. If Congress had not agreed with the courts of appeals that front pay is a permissible equitable remedy under Section 2000e-5(g), it surely would have addressed the issue when making direct reference to the existing remedies. Cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 792, 804 n.4 (1998) (holding that "the force of precedent" associated with *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), was "enhanced" due to Congress's failure to overturn that decision in the 1991 Act).

Congress's establishment in Section 1981a of new damages remedies "in addition to any relief [previously] authorized," 42 U.S.C. 1981a(a)(1), did not alter the

availability of front pay under Section 2000e-5(g). Just as "the new compensatory damages provision of the 1991 Act is 'in addition to,' and does not replace or duplicate, the back-pay remedy allowed under prior law," *Landgraf*, 511 U.S. at 253, so too the new damages provision is in addition to, and does not replace or duplicate, the front-pay remedy also allowed under prior law. See pp. 20-23, *infra* (discussing legislative history of 1991 Act). All courts of appeals to consider the issue, aside from the Sixth Circuit, accordingly have continued to approve awards of front pay as an equitable remedy under Section 2000e-5(g), notwithstanding the availability of compensatory damages under Section 1981a.[13]

2. The court of appeals in this case agreed with our analysis, but *Hudson* v. *Reno*, 130 F.3d 1193 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998), compelled it to treat front pay as a compensatory damages remedy subject to the cap on damages. Pet. App. 21a-22a. *Hudson*, however, misapplied Section 1981a—as every other circuit to consider the issue has held.[14]

---

[13] See, *e.g.*, *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-1349 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000); *Lussier* v. *Runyon*, 50 F.3d 1103, 1107-1108 (1st Cir.), cert. denied, 516 U.S. 815 (1995); *Hadley* v. *VAM P T S*, 44 F.3d 372, 375-376 (5th Cir. 1995); *Williams*, 137 F.3d at 952-954 (7th Cir.); *Gotthardt*, 191 F.3d at 1153-1154 (9th Cir.); *McCue* v. *Kansas Dep't of Human Res.*, 165 F.3d 784, 791-792 (10th Cir. 1999); *EEOC* v. *W&O, Inc.*, 213 F.3d 600, 618-619 (11th Cir. 2000).

[14] See *Martini*, 178 F.3d at 1348-1349 (D.C. Cir.); *Pals* v. *Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499-500 (7th Cir. 2000); *Kramer* v. *Logan County Sch. Dist. No. R-1*, 157 F.3d 620, 625-626 (8th Cir. 1998); *Gotthardt*, 191 F.3d at 1154 (9th Cir.); *Medlock* v. *Ortho Biotech, Inc.*, 164 F.3d 545, 556 (10th Cir.), cert. denied, 528 U.S. 813 (1999); *W&O, Inc.*, 213 F.3d at 619 n.10 (11th Cir.).

The *Hudson* panel acknowledged "that prior to the enactment of the 1991 Civil Rights Act, many courts, including the Sixth Circuit, routinely awarded 'front pay' as an alternative to reinstatement in Title VII actions." 130 F.3d at 1203. The recognition that front pay was established as a remedy available under Section 2000e-5(g) when Congress drafted the 1991 amendments should have ended the court of appeals' inquiry into whether front pay is subject to the cap on compensatory and punitive damages.

The *Hudson* panel nevertheless reasoned that the 1991 amendments required it to decide whether front pay is better characterized as "compensatory damages awarded * * * for future pecuniary losses," and thus subject to the cap under Section 1981a(b)(3), or as equitable relief exempt from the cap pursuant to Section 1981a(b)(2). See 130 F.3d at 1203. The panel concluded that front pay can be described as compensatory damages for future pecuniary losses, and, indeed, the amount of front pay awarded under other statutes is sometimes determined by the jury. *Id.* at 1203-1204.[15] On that basis, the panel concluded that front pay should be subject to the damages cap. *Ibid.*

---

[15] Lower courts disagree whether a jury or the judge should determine the appropriate amount of front pay in some discrimination contexts. See *Newhouse* v. *McCormick & Co.*, 110 F.3d 635, 642-643 (8th Cir. 1997) (discussing cases in ADEA context). Although the *Hudson* panel cited an earlier Title VII case of the Sixth Circuit when categorizing front pay as a damages remedy, 130 F.3d at 1204 (citing *Suggs* v. *ServiceMaster Educ. Food Mgmt.*, 72 F.3d 1228 (6th Cir. 1996)), Sixth Circuit precedent was clear, before *Hudson*, that front pay is an equitable remedy in Title VII cases. See *Thurman* v. *Yellow Freight Sys., Inc.*, 97 F.3d 833, 835 (6th Cir. 1996).

The short answer to *Hudson*'s reasoning is that Congress did not impose a cap on all remedies that can be deemed "legal" rather than "equitable." Congress instead excluded from the cap all pre-existing remedies available under Title VII, however classified. Section 1981a(b)(2) expressly states that "[c]ompensatory damages awarded under [Section 1981a] shall not include * * * any * * * type of relief authorized under [Section 2000e-5(g)]." Because front pay was (and is) an established form of equitable relief under Section 2000e-5(g), Section 1981a(b)(2) excludes it from the category of "compensatory damages" that may be awarded, subject to the cap, under Section 1981a.

The *Hudson* panel also suggested that if "compensatory damages awarded * * * for future pecuniary losses," as used in Section 1981a(b)(3), did not include front pay, the phrase "future pecuniary losses" would be meaningless because "front pay has always been the heart of 'future pecuniary losses' in discrimination suits." 130 F.3d at 1204. But as the Seventh Circuit recently noted, "future pecuniary losses" can include, for example, future medical expenses such as mental health treatments. *Pals* v. *Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 500 (2000). "Future pecuniary losses" compensable under Section 1981a also may include expenses associated with taking a new job (such as job-search and moving expenses) and pecuniary losses associated with reputational harm the plaintiff suffered as a result of discrimination. EEOC Compl. Man. (CCH) § 603, ¶ 2062, at 2070 (1998); *Williams* v. *Pharmacia, Inc.*, 137 F.3d 944, 953 (7th Cir. 1998); see also *Burke*, 504 U.S. at 239 (noting that before 1991, Title VII did not "purport[] to recompense a Title VII plaintiff for * * * harm to reputation, or other consequential damages (*e.g.*, a ruined credit

rating).").[16] Section 1981a thus makes perfect sense when construed as leaving the front pay remedy unaffected.

C. The Legislative History of the 1991 Act And EEOC Guidance Further Support The Conclusion That Front Pay Awards Are Not Subject To The Damages Cap

1. Applying the damages cap to limit front pay would be inconsistent with "Congress' desire to afford victims of discrimination more complete redress for violations of [Title VII]" than Section 2000e-5(g) allows. *Landgraf*, 511 U.S. at 282. When the front pay necessary to make a successful plaintiff whole exceeds the damages cap—which can be as low as $50,000, see 42 U.S.C. 1981a(b)(3)—applying the cap to front pay could well leave the victim *worse off* under the 1991 Act than under prior law: front pay would be reduced below the level that provides equitable relief, and Section 1981a would bar punitive damages and most compensatory damages.[17] Excluding front pay from the scope of compensatory damages thus is critical to ensuring that the 1991 Act in fact provides "additional remedies" to "deter unlawful harassment and intentional discrimination in the workplace." 1991 Act, § 2, 105 Stat. 1071 (*reprinted in* 42 U.S.C. 1981 note).

---

[16] The facts of this case illustrate the point. Petitioner testified that, as a result of harassment while working for respondent, she suffered from "nightmares, fear of crowds, nausea, anxiety, and sleeplessness." App., *infra*, 24a. Petitioner was diagnosed as having post-traumatic stress disorder. *Ibid.* Future expenses associated with treating those conditions properly would be recovered as compensatory damages for future pecuniary losses, subject to the statutory cap.

[17] It is theoretically possible, but far from certain, that newly available but uncapped compensatory damages could make up the difference. See p. 12 & n.7, *supra*.

Committee reports on the 1991 bill note that, whereas victims of intentional employment discrimination based on race could recover compensatory damages under 42 U.S.C. 1981, victims of intentional employment discrimination based on gender or religion could not recover for out-of-pocket expenses, such as medical bills, resulting from illegal harassment. H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 64-65 (1991) (House Education and Labor Comm.); *id.* Pt. 2, at 24-25 (House Judiciary Comm.). The committees found "a compelling need" for damages remedies "in addition to the equitable remedies" that already were available, in order to make victims of gender or religious discrimination whole, to provide appropriate deterrence, and to encourage private enforcement of Title VII. *Id.* Pt. 1, at 70; *id.* Pt. 2, at 28, 29. There is no indication that when legislators endorsed additional remedies to benefit victims of discrimination, deter violations of Title VII, and improve enforcement, they intended to *reduce* equitable awards that would otherwise be available under Section 2000e-5(g). To the contrary, the House Judiciary Committee indicated that equitable remedies were "not affected" by the availability of damages. *Id.* Pt. 2, at 29; see also *West* v. *Gibson*, 527 U.S. 212, 219-220 (1999) (noting legislators' stated intent to create a new remedy in order to help make victims whole).

Legislators, moreover, clearly indicated that front pay should be deemed a form of pre-existing equitable relief exempt from the damages cap. As initially passed by the House, the 1991 amendments provided that compensatory damages would not include "backpay or any interest thereon." H.R. Rep. No. 40, *supra*, Pt. 1, at 12 (proposed Section 206 of 1991 Act); see *id.* Pt. 1, at 74

n.71; *id.* Pt. 2, at 29.[18] The Senate added the further proviso that compensatory damages would not include "any other type of relief authorized under" Section 2000e-5(g). 137 Cong. Rec. 28,663-28,664, 29,066-29,067 (1991) (introduction and passage of Danforth/Kennedy Amendment). Senator Kennedy, the lead co-sponsor of the Senate amendment, explained that, under the Senate amendment, front pay would be treated as equitable relief rather than compensatory damages. *Id.* at 28,637 ("Compensatory damages do not include backpay, interest on backpay, or any other type of relief authorized under Section 706(g) of the Civil Rights Act of 1964, *including front pay*.") (emphasis added).[19] Interpretive memoranda placed in the record of the congressional debates likewise state that front pay would not be treated as compensatory damages under the 1991 Act. *Id.* at 29,046 (Senate sponsors' memorandum); *id.* at 30,661 (interpretive memorandum of Rep. Edwards, noting that "Damages awarded under section

---

[18] As passed by the House before Senate consideration, the 1991 Act capped punitive damages, but not compensatory damages. See 137 Cong. Rec. 13,515, 13,516, 13,552-13,553 (1991) (introduction and passage of Brooks substitute containing punitive damages cap). In the House bill, the exclusion of back pay and interest from the scope of compensatory damages served solely to prevent plaintiffs from recovering duplicative back pay and compensatory damages for the same injury. See H.R. Rep. No. 40, *supra*, Pt. 1, at 74 n.71; *id.* Pt. 2, at 29. When the Senate applied the damages cap to compensatory damages, the provision distinguishing compensatory damages from existing remedies served to define the scope of the damages cap as well.

[19] Legislators who participated in debates on the 1991 Act admittedly made some "frankly partisan" statements about certain hotly-contested aspects of the law. *Landgraf*, 511 U.S. at 262. There was no disagreement, however, about the continued availability of front pay, over and above the new damages remedies.

[1981a] cannot include remedies already available under Title VII, including back pay, the interest thereon, *front pay*, or any other relief authorized under Title VII.") (emphasis added).

2. Citing the legislative history discussed above as well as the language of Section 1981a(b)(2), the EEOC determined in 1992 that front pay is an equitable remedy under Section 2000e-5(g), and is not subject to the cap on compensatory and punitive damages. EEOC, *Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991*, at 13 n.9 & accompanying text (effective July 14, 1992). That contemporaneous interpretation, developed and consistently applied by the agency with primary responsibility for enforcing Title VII, "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank*, 477 U.S. at 65 (quoting *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976)). Accordingly, the EEOC's guidance provides additional grounds for holding that front pay is not subject to the cap on compensatory and punitive damages in an action under Title VII.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
WILLIAM R. YEOMANS
Acting Assistant Attorney General
AUSTIN C. SCHLICK
Assistant to the Solicitor General
DENNIS J. DIMSEY
JENNIFER LEVIN
Attorneys

GWENDOLYN YOUNG REAMS
Associate General Counsel
PHILLIP B. SKLOVER
Associate General Counsel
CAROLYN L. WHEELER
Assistant General Counsel
CAREN I. FRIEDMAN
Attorney
Equal Employment Opportunity Commission

FEBRUARY 2001

APPENDIX A

UNITED STATES DISTRICT COURT
W.D. TENNESSEE, WESTERN DIVISION

No. 95-3010 M1/V

SHARON B. POLLARD, PLAINTIFF

v.

E.I. DUPONT DE NEMOURS, INC., DEFENDANT

Aug. 20, 1998

MEMORANDUM OPINION AND ORDER

MCCALLA, District Judge.

Plaintiff, Sharon Pollard, brought this suit against her former employer, alleging that she had been subjected to a hostile work environment because of her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). A non-jury trial was held in this matter on October 14, 15, 16, and 24, and November 3 and 4 of 1997. For the reasons set forth below, the Court finds that plaintiff was subjected to a hostile work environment because of her gender, in violation of Title VII, and judgment is ENTERED in favor of plaintiff.

FINDINGS OF FACT

Plaintiff began her employment with defendant in 1977 as a utility worker in the utility pool. She was promoted to the position of assistant operator ("AO") in the oxone flouride area in 1978, and transferred to an AO position in the hydrogen peroxide area in 1979. In 1987, plaintiff was promoted to the position of operator in the hydrogen peroxide area. While plaintiff was working as an operator in peroxide, only one other woman was in an operator position in that area, and only two of the assistant operators were female. All of the other operators and assistant operators in the peroxide area were male.[1]

Plaintiff initially worked as an operator on "C" shift from 1987 to 1992. Each shift has three operators: the control room operator (or operator # 1), operator # 2, and operator # 3. Each operator has separate duties on the shift, and none of the operators is superior in rank to the others. The control room operator works in the control room, the # 2 operator works the south side of the area, and the # 3 operator works in the laboratory and in the water building. The three AOs that are assigned to each shift take direction from the operators. While plaintiff was working as the control room operator on "C" shift, an incident occurred during which an AO, Rory Bricco, refused to take direction from plaintiff. Mr. Bricco informed plaintiff that he

---

[1] Based on testimony at trial, the Court concludes that there are four different shifts ("A", "B", "C", and "D"), with approximately seven people on each shift. *See* Testimony of Mark Cobb ("Cobb's Test."), Trial Transcript ("Tr.") at 240. Accordingly, of the approximately twenty-eight employees on shifts in the peroxide area, only four were women.

could not take direction from a woman, and placed a Bible on her desk, opened to a passage which read, "I do not permit a woman to teach or have authority over a man. She must be silent."[2] Plaintiff subsequently transferred to a # 2 operator position on "A" shift in 1992.

In 1994, plaintiff had moved from the # 2 operator position to the # 3 operator position on "A" shift in the peroxide area. The other members of her shift were Steve Carney, Jerry Lee, Joey Moody, David Walker, and Mark Cobb. Carney was the control room operator, Lee was the # 2 operator, and Cobb, Moody, and Walker were the three AOs on the shift. The shift supervisor at that time was David Swartz.

During 1992 and 1993, plaintiff and all of the other members of "A" shift got along well. Many of the witnesses testified that they viewed the shift as their "extended family." Members of the shift would cook and eat their meals together in the break room,[3]

---

[2] The Court notes that this event occurred outside of the relevant time period in this case, which is from December 1994 to December 1995, and thus cannot form a basis for liability on the part of defendant. Because allegations involving this same Bible verse are properly before the Court, however, this event is included as context, as the Court finds that the fact that plaintiff had been previously exposed to this Bible verse while working in the peroxide area contributed to the intensity of her reaction when she saw it for the second time.

[3] There were three separate eight hour shifts in the peroxide area: the 8:00 a.m. to 4:00 p.m. shift, the 4:00 p.m. to 12:00 midnight shift, and the 12:00 midnight to 8:00 a.m. shift. The employee break room included a small kitchen area with a stove, refrigerator, and microwave, and, particularly on the evening and midnight

and would talk to each other regularly about their lives outside of work.

In February of 1994, however, the congenial atmosphere on "A" shift began to change. At that time, DuPont announced that it would be taking part, for the first time, in the nationally recognized "Take Your Daughters to Work Day" ("TYDTWD") in April of that year. Plaintiff, as one of two female operators in the entire peroxide area, was asked to give a talk about her job to some of the girls coming to visit the plant on that day, and she agreed to do so. A number of the men on "A" shift, particularly Steve Carney and Jerry Lee, were against TYDTWD, and made their displeasure with DuPont's decision to take part in this event widely known. A number of other men in peroxide, and throughout the plant, were against DuPont's participation as well. *See* Testimony of Jerry Lee ("Lee's Test."), Tr. at 495. One of these men, Paul Lucas, sent an email out to everyone in the plant regarding TYDTWD, referring to the event as "horse malarky."

Plaintiff had discussions with both Steve Carney and Jerry Lee regarding her participation in TYDTWD, and both men made clear that they were against it. Testimony of Sharon Pollard ("Pollard's Test."), Tr. at 627-28. Subsequent to those discussions, the atmosphere on the shift began to change. All of the men on the shift, with the exception of Mark Cobb, stopped eating with plaintiff and stopped talking to her. Cobb testified that Carney instructed the other men on the shift not to eat with plaintiff, not to share food with her, not to be in the break room with her, and not to talk to

---

shifts, members of "A" shift would divide up cooking duties and take turns bringing in food to allow them to eat together.

her. Cobb's Test. at 251, 273. Plaintiff testified as follows:

> [I]f I came into the lunchroom, nobody would sit down at the table with me. If I sat down at a table that someone was already sitting at, they would get up and leave. . . . I heard a lot of under your breath kind of things . . . and snickering.

Pollard's Test., Tr. at 37. Cobb further stated that Carney instructed the other men on "A" shift not to follow any of plaintiff's instructions without checking with him first. Cobb's Test., Tr. at 251-52. Carney himself conceded that "[i]t's a possibility" that he told AOs on "A" shift to disregard plaintiff's instructions. *Id.* at 904.

It was common knowledge among the employees in the peroxide area that Steve Carney, Jerry Lee, Rory Bricco, and many of the other men in the area, did not approve of women working in peroxide. Cobb's Test., Tr. at 246-47, 251, 359, 361; Testimony of David Walker ("Walker's Test."), Tr. at 746-47. Mark Cobb testified that Carney would make comments to this effect approximately five times per week to the men on "A" shift, and Cobb and several other witnesses confirmed that Carney routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52.

Several witnesses testified that they had heard Carney use the word "heifer" to refer to women, and that use of the term "heifer" to refer to women in general was commonplace in the peroxide area. Testimony of Joey Moody ("Moody's Test."), Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723. Carney

admitted that he referred to women as "heifers," and that he referred to plaintiff as a "bitch" and a "split tail." Testimony of Steve Carney ("Carney's Test."), Tr. at 908-09. In addition, DuPont had a company-sponsored support group known as the Women's Network,[4] of which Carney routinely expressed his disapproval. Cobb's Test., Tr. at 246-47; *see also* Testimony of Kay Jenks ("Jenks' Test."), Tr. at 416 (noting that the men on plaintiff's shift did not approve of plaintiff attending the meetings of the Women's Network).

In May of 1994, after plaintiff had been experiencing the kind of isolation described above from the members of "A" shift for approximately two months, the shift supervisor, David Swartz, held a training meeting.[5] During the meeting, all of the members of "A" shift and Swartz were seated around a small conference table. At some point during a break in the meeting, Carney and Walker were having a discussion about a girls softball team, during which Carney said "that heifer can't coach," in reference to the woman who coached the team. Moody's Test., Tr. at 697. Carney also said something along the lines of "women have no business coaching." Moody's Test., Tr. at 677-78; Walker's Test., Tr. at 753; Lee's Test ., Tr. at 472-73; Pollard's Test., Tr. at 632. Plaintiff, who was sitting across the table from Carney, heard these comments, became very upset, and asked to be excused to go to the nurse's station. Pollard's Test., Tr. at 632-34.

---

[4] Plaintiff regularly attended meetings of the Women's Network.

[5] This training meeting was not held to address the problems on the shift, rather it was a training session on work-related matters that was regularly held on Tuesdays.

Once she arrived at the nurse's station, plaintiff asked the nurse to call her supervisor, David Swartz, to come and speak with her. When Swartz arrived, plaintiff was very upset and began to cry. Swartz testified that she told him "that she couldn't take it any more, she was tired of people talking about women the way they do . . . [that Steve Carney had said] 'Well, that heifer can't coach,' . . . and she was just tired of them saying that women can't do anything." Testimony of David Swartz ("Swartz's Test."), Tr. at 949-50. Swartz further testified that he understood plaintiff's words to mean that "she couldn't take it any more about [the] men [in peroxide] degrading women." *Id.* at 979-80.

Swartz testified that he spoke with his supervisor, Alan Hubbell, about this incident, and that they decided that Swartz should speak to the men on the shift individually. Swartz's Test., Tr. at 952. With the exception of Walker, however, none of the men on the shift remembered Swartz speaking to them about this incident. Carney testified that Swartz spoke to him "a few times" about not communicating with plaintiff "right after [they] quit talking," but that Swartz soon gave up on trying to talk to him about it "because he knows I'm hardheaded . . . [and there] wasn't no sense [sic] in saying anything else." Carney's Test., Tr. at 883-84.

Swartz testified that he could tell "there was tension on the shift" beginning in the spring of 1994, and that things did not improve during the rest of the year. Swartz's Test., Tr. at 954-55. He testified that many of the men talked to him about the tension on the shift, and that plaintiff complained to him about the lack of

communication and isolation on several occasions. *Id.* at 954, 956. When asked by counsel for DuPont what he, as the shift supervisor, tried to do to address the situation between spring of 1994 and December of 1994, Swartz responded:

> Well, I mean we continually talked to each individual. . . . I worked personally talking to each one of them hopefully [sic] that we could get back together, you know, as a more friendly group where it would relieve the tension, but it didn't seem to work.

Id. at 955.

During the spring and summer of 1994, plaintiff's situation worsened. The men on the shift still refused to eat with her or speak with her. She testified, and Mark Cobb corroborated, that on several occasions Carney would set off false alarms in her area, causing her to run around the peroxide area in search of a non-existent problem.[6] Pollard's Test., Tr. at 38; Cobb's Test., Tr. at 266-69. Cobb testified that Carney would brag to the other men on "A" shift about making plaintiff run all over plant to "show[] that he's in control." Cobb's Test., Tr. at 269. Cobb further testified that on two separate occasions after a false alarm had been pulled while plaintiff was cooking her dinner, one of the men would turn up the stove under her food, burning her dinner and rendering it inedible. *Id.* at 270-71. Cobb also stated that on several occasions, Carney would not call out actual alarms from plaintiff's area.[7]

---

[6] Several witnesses testified that the peroxide area was the size of three city blocks.

[7] Based on the testimony during the trial, it appears that the control room operator sits in the control room of the peroxide area

Id. at 275. As a result, plaintiff would not respond to the problem, and it would appear to the # 3 operator on the next shift that she was not doing her job. *Id.* at 275.

Part of plaintiff's job as the # 3 operator was to monitor the vaporizers in the peroxide tanks, determine when they should be moved, and instruct the AOs to move them according to this schedule. Pollard's Test., Tr. at 32-33; Moody's Test., Tr. at 687. Plaintiff testified that, on several occasions, Carney told one of the AOs on "A" shift to remove the vaporizer from the tank earlier than plaintiff had planned for it to be removed, and then instructed them not to tell her that they had done so. Pollard's Test., Tr. at 32-33, 35. Plaintiff needed to sample the peroxide one hour after the vaporizer was removed. *Id.* at 90; Moody's Test. at 710. Accordingly, if the vaporizer was removed early, and plaintiff was not informed that it was removed, the resulting product could be too weak.[8] The fact that the peroxide was not timely sampled also created more work for the # 3 operator on the next shift, and made it appear that plaintiff was not doing her job. *Id.* at 94-95. In addition, removing the vaporizer early could mean that not enough peroxide was made for the

---

and monitors a series of instrument panels. If there is a problem, the control room operator will become aware of it via these instruments. The control room operator is then supposed to call out an alarm over the intercom system to the operator or AO working in the relevant area, so that the appropriate individual can go check on the problem.

[8] Various percentage strengths of peroxide were made at DuPont. Plaintiff testified that if a tank was off even 2%, e.g., a tank that was supposed to be 70% strength was 68% instead, it could not be brought back up to the proper percentage because the volume of chemicals that would have to be added would not fit into the already full tank. Pollard's Test., Tr. at 102-03.

shipment out to DuPont's customers the next day, again making it appear as if plaintiff was not competently executing her job duties. *Id.* 89-90.

Plaintiff testified that the vaporizers were removed early approximately seven times during 1994 and 1995, with the most recent incident occurring during the week of July 5-11, 1995. After the first time that the problems with the vaporizers occurred, plaintiff spoke with David Walker and Joey Moody about it and asked them not to do it again. *Id.* at 98. Moody told her that he was following Carney's instructions. *Id.* Carney himself testified that he would sometimes tell one of the AOs to move a vaporizer, and that when he did so he did not believe that he had an obligation to tell plaintiff. Carney's Test., Tr. at 895.

Plaintiff testified that she spoke to her supervisor, David Swartz, about the vaporizer problem the second time it occurred, and every time after that. Swartz admitted that he spoke with plaintiff on several occasions during the spring and summer of 1994, and that she complained to him that "she wasn't getting communication—that Steve wasn't calling out alarms or he wouldn't say stuff to her when [vaporizers] were pulled or whatever because she had responsibility [for] sampling those tanks." Swartz's Test., Tr. at 957. Swartz testified that his only response to these complaints was the following:

> I [Swartz] would go to Steve and say "Steve, that's part of your job, you got to call out alarms." His response was, "I'm calling out the alarms, she's not answering it." So I was hearing it from both sides. And I would tell Sharon, "Steve's saying you're not responding to it." And she would say that she was,

> and so we had to get that communication link straightened out, and I thought that eventually that worked out. . . .

Id. 957. The evidence in the record, however, demonstrates that the problem was *not* solved, and that Swartz never investigated plaintiff's complaints further.

During the summer of 1994, plaintiff came to work one day and found that both of the tires on her bicycle had been slit open.[9] Swartz admitted that the day that plaintiff discovered that the tires had been cut, she reported it to him and told him that she suspected that Carney was responsible. Swartz's Test., Tr. at 959. In response to this complaint, Swartz spoke with Carney, and Carney denied cutting plaintiff's tires. *Id.* Again, after Carney denied the allegations, Swartz did nothing else to investigate plaintiff's complaints. Swartz stated, "I didn't have any other facts to go on that would say that he did it." *Id.* 959-60. Accordingly, rather than investigate further, Swartz did nothing.

In December of 1994, after these problems had been occurring for ten months with no improvement, Mark Cobb and David Walker approached David Swartz and asked him to call a meeting with the entire shift to discuss the situation.[10] Accordingly, a meeting was held in late December of 1994 that came to be known as the "first healing meeting." On the date that the

---

[9] Because the DuPont plant is so large, employees often ride bicycles from the front gate to their area.

[10] The Court notes that even after all of the complaints that Swartz had received during the past ten months from plaintiff, the idea to call a meeting to discuss the situation was not his.

meeting was to be held, Carney was on vacation. The members of the shift discussed whether or not they should proceed with the meeting without him, and decided to go ahead.

At this meeting, Walker and Moody told plaintiff that Carney had encouraged them not to talk to her. Pollard's Test., Tr. at 46. Walker and Moody also told plaintiff that Carney had told them that she was "keeping a book on them" in which she wrote down everything they said to use it against them. *Id.* Plaintiff assured them that she was not keeping a book, and then explained to them how stressful the isolation was for her, and how she "had to run around and do more steps than [she] would normally do to get [her] job done . . . because [she] wasn't getting communicated with." *Id.* at 47. Plaintiff also explained to them that the lack of communication was dangerous because a spill or explosion could result, and that it could also cause a shipment to a customer to be missed. *Id.* at 51. David Swartz was present throughout this meeting and, again, heard all of plaintiff's complaints.

When Carney returned from vacation and learned that "A" shift had held a meeting without him he was furious, and demanded that another meeting be held. Pollard's Test., Tr. at 51; Cobb's Test., Tr. 285-86; Moody's Test., Tr. at 684; Swartz's Test., Tr. at 961. During the second meeting, the entire shift, including Swartz, was present. Plaintiff reiterated all of her concerns about the lack of communication and other problems. Plaintiff also mentioned that her bike tires had been slashed, and another incident that summer in which she believed that Carney had tried to run her off

the road in his truck as she left the DuPont plant.[11] Moody's Test., Tr. at 685; Walker's Test., Tr. at 738. At the second meeting, Carney "got in [plaintiff's] face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault." Pollard's Test., Tr. at 52; Moody's Test., Tr. at 684-85; Cobb's Test., Tr. at 289-90. Plaintiff then turned to Swartz, who was observing this interaction, and asked him if he was going to permit Carney to speak to her in that manner. Cobb's Test., Tr. at 290-91; Pollard's Test., Tr. at 52; Swartz's Test., Tr. at 993. Swartz then said "I think that's enough," and the meeting ended with no further resolution of the issues. *Id.*

Subsequent to these meetings, the situation did not improve. Swartz was aware that the hostility and tension on the shift had not abated, and plaintiff continued to complain to him that the environment was intolerable for her. Swartz's Test. at 964. Swartz, however, took no action to help her. During this time period, plaintiff attended several meetings of the Women's Network and spoke to the group about the problems she was facing, the isolation she was experiencing, and the psychological effect it was having on her. Jenks' Test., Tr. at 415-17. Kay Jenks, a female engineer and one of the leaders of the Woman's Network, testified that during the Network meetings plaintiff:

> was concerned that she would be out there on nights, frequently the only woman on shift, she would go for hours without even hearing another

---

[11] Swartz concedes that he never did anything to investigate plaintiff's allegation that Carney tried to run her off the road. Swartz's Test., Tr. at 1004.

> voice. . . . She was concerned that something would happen that would endanger her and they would not tell her, they would not get ahold of her, she was also concerned that maybe something would go wrong in the process that she could help fix or impact, but they wouldn't let her know in time and then it would reflect poorly on her performance.

Id. at 417.

In attendance at some of these meetings was Beth Basham, unit supervisor for the peroxide area.[12] Basham conceded that she heard plaintiff talk about the problems she was having with the men in peroxide on several occasions. Basham's Test., Tr. at 1184, 1194-95. Basham further testified that she "knew there was a real problem in the peroxide area of the male workers accepting the role of a female in that area," and that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." *Id.* at 1195, 1217. In spite of this knowledge, however, Basham never investigated the situation based on what she had learned at the Women's Network meetings.[13] Basham testified that she never wrote a report or sent a memorandum to anyone in upper management at DuPont stating that there was a real problem in the peroxide

---

[12] Basham was the supervisor of Alan Hubbell, who was David Swartz's supervisor. Basham was the "number one person in the peroxide area," and reported directly to the plant manager, Gary Lewis. Testimony of Beth Basham ("Basham's Test."), Tr. at 1181-82.

[13] Basham did become involved in the investigation that took place during the summer of 1995, but, prior to that, did nothing to formally investigate plaintiff's charges of harassment, despite learning of them in the context of the Women's Network meetings.

area regarding the treatment of female employees, and she "could not recall" if she ever discussed the situation with anyone at DuPont's headquarters informally. *Id.* at 1197-98.

On May 25, 1995, the Women's Network hosted a meeting at which Bernie Scales, a specialist in diversity training from DuPont's headquarters, spoke to the Network. At that meeting, plaintiff began to talk about the isolation and harassment she was receiving from the men in peroxide, and asked to speak to Scales further at the conclusion of the meeting. After the meeting was over, Scales met with plaintiff. At that meeting plaintiff told Scales all about the long-term harassment and isolation she had been experiencing. As a result of that meeting, Scales spoke to the plant manager Gary Lewis, who then spoke to Bob Shaw, employee relations manager for the Memphis DuPont plant. On May 28, 1995, Shaw, Lee Ann Rice,[14] and Gary Fish[15] met with plaintiff to discuss her situation. During the course of that meeting, plaintiff recounted the full history of the harassment she had experienced in the peroxide area, including the allegation that Carney had tried to run her off the road the previous summer, and told them that she wanted this situation corrected. Testimony of Bob Shaw ("Shaw's Test."), Tr. at 1094; Testimony of Lee Ann Rice ("Rice's Test."), Tr. at 401; Pollard's Test., Tr. at 62. Subsequent to that meeting, Shaw and Swartz spoke to Carney about his behavior. Swartz's Test., Tr. at 968. Carney never received a formal written reprimand, was never sus-

---

[14] Rice is a manager in Human Resources. Her supervisor is Bob Shaw.

[15] Fish was a plant shift supervisor.

pended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04. In addition, neither Shaw, nor anyone else at Dupont, ever investigated plaintiff's allegation that Carney had tried to run her off the road, after Shaw spoke to Carney and Carney denied that it had occurred. Shaw's Test., Tr. at 1102. Even after Bernie Scales returned to Wilmington with knowledge of plaintiff's concerns, no one from DuPont headquarters ever came to the Memphis plant to investigate plaintiff's allegations. Basham's Test., Tr. at 1250-51.

After Shaw spoke to Carney, Carney's behavior improved for about four weeks. During the week of July 5-11, 1995, however, Carney returned to his prior patterns of behavior. Pollard's Test., Tr. at 107. Another incident in which the vaporizer was taken out early without plaintiff's knowledge also occurred during this week. *Id.* at 89. Plaintiff went to David Swartz and begged him to "just get me off this shift, nothing's changed and I can't take it." *Id.* at 107. Rather than investigating the situation or moving Carney to another shift, Swartz spoke to plaintiff the next day and informed her that a control room operator position on another shift was available. *Id.* at 108; Swartz's Test., Tr. at 994-96. Plaintiff did not want to take this position because it was on the same shift with Rory Bricco, the man who had refused to take direction from her when she was a control room operator on "C" shift. Plaintiff told Swartz she would not bid for that position. Pollard's Test., Tr. at 108-09.

On July 28, 1995, plaintiff discovered a highlighted copy of the same Bible verse that Bricco had put on her

desk when he refused to take direction from her in her mailbox at work. As noted above, that Bible verse read: "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Tr. at 407 (quoting 1 *Timothy* 2:11). When plaintiff discovered the Bible verse, she described her reaction as follows:

> I felt like I had been hit with a brick, I just couldn't believe that after all that had been talked about, they were asking me to go back into the control room . . . and I just considered [that] this was the men's answer to that.

Pollard's Test., Tr. at 110.

Subsequent to that event, plaintiff never returned to work at DuPont. A committee was formed to investigate the Bible verse incident. As with the other "investigations" that DuPont had initiated with regard to plaintiff's complaints, this one was wretchedly inadequate. The investigation consisted of asking an identical series of typed questions to each of the men on "A" shift individually, and to the other men in the peroxide area in groups. Shaw's Test., Tr. at 1106. All of the questions were answerable with a simple yes or no, and when all of the men denied having any knowledge of the incident, DuPont proceeded no further with the investigation. Shaw's Test., Tr. at 1268, 1270. No one from DuPont management ever questioned Steve Carney about whether he was involved in the Bible verse incident. Carney's Test., Tr. at 931.

After plaintiff left "A" shift, a party was held to celebrate her departure. Cobb's Test., Tr. at 277-79; Carney's Test., Tr. at 931-32. Steve Carney fried cat-

fish and crappie that he had brought in, and the other men blew up balloons and taped them to the ceiling. *Id.* Mark Cobb testified that at the party Carney declared, "glad the bitch is gone, glad the bitch is not coming back." Cobb's Test., Tr. at 278. Carney himself testified as follows:

> Q: Now, after she [plaintiff] left, there was a party in the peroxide are [*sic*], wasn't there?
>
> A: Yes, ma'am.
>
> Q: And you participated in that party, correct?
>
> A: Yes, ma'am.
>
> Q: And there were balloons at that party, correct?
>
> A: Yes, ma'am.
>
> Q: And I believe there was crappie cooked, correct?
>
> A: Yes, ma'am.
>
> Q: And you do recall that, don't you?
>
> A: Yes, ma'am.
>
> Q: You were celebrating the departure of Sharon Pollard, weren't you?
>
> A: Yes, ma'am.

Carney's Test., Tr. at 931-32.

Plaintiff was on short-term disability leave for the next six months, during which time she saw a number of psychologists and psychiatrists that DuPont required

her to visit. In particular, DuPont sent plaintiff to Dr. Fred Steinberg, who concluded she could not return to work. In spite of this opinion, however, DuPont scheduled a "return to work" meeting with plaintiff in February of 1996. At that meeting DuPont management would not guarantee that plaintiff would not be put back on a shift with Carney. Pollard's Test., Tr. at 219. Plaintiff told them that she could not return to work under those conditions, and DuPont terminated her, effective February 29, 1996. *Id.* at 154, 217-19.

CONCLUSIONS OF LAW

Title VII prohibits discrimination "against any individual with respect to [her] compensation, conditions, or privileges of employment, because of such individual's. . . sex." 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment. As noted by the Sixth Circuit in *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 825 (6th Cir. 1997), the statute grants employees "the right to be work in an environment free from discriminatory intimidation, ridicule, and insult." 104 F.3d at 825 (quoting *Meritor*, 477 U.S. at 65, 106 S. Ct. 2399).

In order to succeed on a hostile work environment claim, a plaintiff must prove the following elements: 1) the plaintiff is a member of a protected class; 2) the plaintiff was subject to unwelcomed sexual harassment; 3) the harassment complained of was based on sex; 4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work

performance and creating an intimidating, hostile, or offensive work environment; and 5) the employer knew, or should have known, of the charged sexual harassment, and failed to take prompt and appropriate corrective action. *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 49 (6th Cir. 1996).

There is no question that plaintiff satisfies the first two elements as required by *Fleenor*. First, as a woman, plaintiff is a member of a protected class. Second, it is clear from plaintiff's repeated complaints, initially to her supervisor David Swartz and later to other members of DuPont management, including Shaw, Rice, Scales, and Basham, that the harassment plaintiff was experiencing was unwelcome.[16]

With regard to the third element of the *Fleenor* test, the Court concludes that plaintiff has unequivocally established that the harassment she experienced was based on her gender. As recently clarified by the Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L.Ed.2d 201 (1998), harassment based on gender need not be sexual in nature:

> [H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination based on sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and deroga-

---

[16] Moreover, plaintiff's repeated complaints during the Women's Network meetings, and to the other members of "A" shift during the two "healing" meetings held in December 1994, further support the Court's conclusion that the harassment was unwelcome.

> tory terms . . . *as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.*

Oncale, 523 U.S. at 80, 118 S. Ct. at 1002 (emphasis added).

As noted above, the record is replete with evidence that several of the men in the peroxide area were "motivated by general hostility to women in the workplace," and felt strongly that women did not belong in the peroxide area. Cobb's Test., Tr. at 246-47, 251, 359, 361; Walker's Test., Tr. at 746-47; Basham's Test., Tr. at 1195. Specifically as to plaintiff's shift, Steve Carney stated that women didn't belong there approximately five times per week, and routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52. Use of the term "heifer" to refer to women was commonplace behavior by men in the peroxide area. Moody's Test., Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723.

Carney himself testified that he referred to women as "heifers" and that he referred to plaintiff as a "bitch" and a "split tail."[17] Carney's Test., Tr. 908-09. Carney, and the other men on "A" shift, repeatedly voiced their objections to the Women's Network and to DuPont's participation in "Take Your Daughters to Work Day." Even Beth Basham, DuPont's unit supervisor of the peroxide area, conceded that she "was of the firm belief that plaintiff had been harassed on account of her sex in

---

[17] The Court notes that several witnesses testified that they considered Carney to be a "leader." Walker's Test., Tr. at 757; Swartz's Test., Tr. at 992.

the peroxide area." Basham's Test., Tr. at 1217. Finally, the content of the Bible verse placed in plaintiff's mailbox on July 28, 1995, leaves absolutely no doubt in the Court's mind that the harassment of plaintiff was based on her gender.

As to the question of whether the harassment was pervasive enough to constitute a hostile work environment and unreasonably interfere with plaintiff's work performance, the Supreme Court reaffirmed the standard set forth in *Meritor*, and further clarified it in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). In *Harris*, the Court explained that the conduct must be judged by both an objective and subjective standard. 510 U.S. at 21-22, 114 S. Ct. 367. Accordingly, "the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive." *Black*, 104 F.3d at 826 (citing *Harris*, 510 U.S. at 21-22, 114 S. Ct. 367.) "This standard . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris*, 510 U.S. at 21, 114 S. Ct. 367.

The Supreme Court acknowledged that this approach is not susceptible to a "mathematically precise test," *id.* 510 U.S. at 22, 114 S. Ct. 367, but sought to provide some guidance with regard to the determination of whether a work environment was objectively hostile or abusive. The Court explained that all of the circumstances should be considered, and offered a non-

exhaustive list of relevant factors, including:

> [T]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. 510 U.S. at 23, 114 S. Ct. 367.

Based on the evidence set forth above, the Court concludes that harassment faced by plaintiff while she was on the "A" shift at DuPont, and specifically during the December 1994 through December 1995 period relevant to liability in this case, constituted a pervasively hostile environment and unreasonably interfered with her work performance. The false alarms, failure to communicate alarms and other information necessary for plaintiff's job, and the early removal of the vaporizers at Carney's instruction on several occasions, are examples of direct interference with plaintiff's execution of her job duties. This kind of deliberate tampering with plaintiff's area of responsibility could have, and very well may have, resulted in safety risks or production shortages, and made plaintiff appear incompetent to the # 3 operator on the next shift.

Moreover, as Justice Ginsburg noted in her concurring opinion in *Harris*, to show unreasonable inter-

ference with a plaintiff's work performance, "'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'" 510 U.S. 17, 25, 114 S. Ct. 367, 126 L.Ed.2d 295 (Ginsburg, J., concurring) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988)). The Court finds that plaintiff has demonstrated that the harassment so altered her working conditions as to make it more difficult to do her job, on both an objective and subjective level.

Plaintiff testified that she suffered from nightmares, fear of crowds, nausea, anxiety, and sleeplessness. A psychologist and a psychiatrist who saw plaintiff both concluded that she suffered from post-traumatic stress disorder. *See* Testimony of Dr. Janet Hill, Tr. 775-851; Testimony of Dr. Richard Farmer, Tr. 502-79. Several witnesses testified about the dramatic change in plaintiff's personality during this time period. Jenks' Test., Tr. at 418; Testimony of Charlotte Blaylock, Tr. at 442-44; Testimony of John Pollard, Tr. at 451-52.

Plaintiff testified extensively about the enormous psychological effect the long-term campaign of harassment, intimidation, and isolation executed by the men on "A" shift had on her mental and emotional state. Plaintiff stated that the last straw in the long ordeal, the placing of the Bible verse in her mailbox at work, so upset her and interfered with her ability to perform her job that she left her position at the plant where she had worked for the past seventeen years and did not return.

Accordingly, the Court concludes that plaintiff has satisfied the fourth requirement necessary for a hostile environment claim, in that she has demonstrated that the harassment "unreasonably interfer[ed] with [her] work performance and creat[ed] an intimidating, hostile, [and] offensive working environment." *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 49 (6th Cir. 1996).

Finally, the Court must consider whether DuPont knew, or should have known, of the charged sexual harassment and failed to take prompt and appropriate corrective action. The evidence on this point is overwhelming. As set forth above, beginning in the spring of 1994, plaintiff complained about the lack of communication, constant disparaging remarks about women, and the sabotage of her work by the men on her shift to her supervisor, David Swartz.

Time and time again, after receiving these complaints from plaintiff,[18] Swartz either made a half-hearted attempt to speak to Carney, which ended as soon as Carney denied the conduct, or did nothing at all. Carney testified that after a few attempts, Swartz quit talking to him because he was "hard-headed" and Swartz knew "there wasn't no sense [sic] in saying

---

[18] The Court notes that the testimony of both plaintiff and Swartz reveals that plaintiff discussed her situation with Swartz throughout the latter half of 1994 and in 1995. As to specific instances, however, the record reveals that Swartz was on notice of plaintiff's complaints in May of 1994 after Carney's comment that "women had no business coaching" at the training meeting, during the summer of 1994 when plaintiff complained to Swartz the day after her bicycle tires were cut, and in December 1994 when Swartz was present at the two "healing meetings" at which plaintiff set forth all of her complaints and concerns. Swartz's Test., Tr. at 949-50, 979-80, 958, 959-60, 993.

anything else." Carney's Test., Tr. at 883-84. Swartz himself conceded that his efforts to remedy the situation "didn't seem to work." Swartz's Test., Tr. at 955. However, Swartz took no further steps to end the campaign of harassment being waged against plaintiff by the men on "A" shift.

Swartz testified that, at least after the softball coach incident in May of 1994, he spoke to his supervisor Alan Hubbell about the situation in peroxide. Swartz's Test., Tr. at 952. In spite of the fact that the situation did not improve, Hubbell never followed-up on the situation or initiated any kind of formal investigation. Beth Basham, the highest-ranked supervisor in the peroxide area, testified that she was on notice of the harassment plaintiff was experiencing based on her attendance at Women's Network meeting at which plaintiff spoke about her situation. Basham, Tr. at 1184, 1194-95. Just as with Swartz, however, Basham did nothing to investigate the situation or discipline the individuals involved. After Bob Shaw, employee relations manager for the Memphis plant, became aware that this harassment had been ongoing since 1994, Shaw spoke to Carney about it, but never formally disciplined him in any way. Bernie Scales, from DuPont headquarters, was aware of the situation based on plaintiff's meeting with him on May 25, 1995. However, no one from DuPont's headquarters ever visited the Memphis plant to follow-up on plaintiff's situation or conduct an investigation of her allegations.

Several witnesses testified that DuPont has a progressive disciplinary system in which employees are to receive increasingly severe sanctions if the misconduct at issue does not cease. Sanctions in this system range

from an informal oral reprimand to termination. In spite of all of the complaints plaintiff made against him, and the fact that the situation did not improve, Steve Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04.

This situation was reprehensible. This is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched. Plaintiff repeatedly complained to DuPont management to no avail. Accordingly, the Court concludes, without reservation, that DuPont knew of the charged sexual harassment and utterly failed to take prompt and appropriate corrective action.

Plaintiff has, therefore, satisfied each of the elements necessary to prove that she was subjected to a hostile work environment based on her gender in violation of Title VII, and judgment is ENTERED in favor of plaintiff as follows:

1. Defendant is ORDERED to pay plaintiff $107,364.00 in back pay and accrued benefits;

2. Defendant is ORDERED to pay plaintiff $300,000.00 in compensatory damages,[19] in

---

[19] The amount of compensatory damages includes front pay, pursuant to the Sixth Circuit's holding in *Hudson v. Reno*, 130 F.3d 1193, 1204 (6th Cir. 1997) ("[W]e conclude that front pay is subject to the caps on future pecuniary losses as provided in § 1981a(b)(3) because front pay is a 'future pecuniary loss.'"). The Court notes that the $300,000.00 award is, in fact, insufficient to

accordance with the statutory cap set forth in 42 U.S.C. § 1981a(b)(3); and

3. Defendant is ORDERED to pay plaintiff's attorney fees and costs. Plaintiff shall submit a statement of fees and costs related to this matter to the Court by September 15, 1998. Defendant may file a response to plaintiff's submittal by September 30, 1998. The Court will then determine the appropriate amount of attorneys fees and costs to be awarded, and will so advise the parties.

---

compensate plaintiff for the psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement. The Court is bound by the statutory cap set forth in § 1981a however, and cannot award plaintiff compensatory damages in excess of that cap.

Because the amount of compensatory damages awarded by the Court is $300,000.00), the Court is thus prohibited by the statutory cap from awarding plaintiff any punitive damages. *See* 42 U.S.C. § 1981a(b)(3) ("The sum of the amount of compensatory damages awarded . . . and the amount of punitive damages awarded . . . shall not exceed . . . $300,000.00"). For the record, however, the Court finds that punitive damages are justified in this case, as defendant has "engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual," 42 U.S.C. § 1981a(b)(1), and, absent the statutory cap, the Court would have awarded punitive damages based upon DuPont's repeated failure to remedy this egregious situation.

APPENDIX B

STATUTORY PROVISIONS

1. Section 706(g) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261, as amended, which is codified at 42 U.S.C. 2000e-5(g), provides:

> **Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders**
>
> (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.
>
> (2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or

was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

2. Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072-1074, which is codified as 42 U.S.C. 1981a, provides:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of

1964 (42 U.S.C. 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section,

in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(b)(5)) or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)).

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar

weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the

Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.